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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE NORTHERN DISTRICT OF CALIFORNIA

8 MIGUEL MOLINA,

9 Petitioner,

10 vs.

11 BEN CURRY, Warden,

12 Respondent.
13 _____

No. C 07-3313 MMC (PR)

**ORDER GRANTING MOTION TO
DISMISS**

(Docket No. 9)

14 On June 25, 2007, petitioner, a California prisoner incarcerated at the Correctional
15 Training Facility, Soledad, and proceeding pro se, filed the above-titled petition for a writ of
16 habeas corpus pursuant to 28 U.S.C. § 2254. On October 16, 2007, after reviewing the
17 petition, the Court ordered respondent to file an answer showing cause why the petition
18 should not be granted, or in the alternative, a motion to dismiss on procedural grounds.
19 Respondent chose the latter course, and has filed a motion to dismiss the petition on the
20 ground that the petition is barred by the applicable one-year statute of limitations. See 28
21 U.S.C. § 2244(d). Petitioner has filed an opposition; respondent has not filed a reply.

22 **BACKGROUND**

23 In 1985, in the Superior Court of San Luis Obispo County (“Superior Court”),
24 petitioner was convicted of second degree murder. He was sentenced to a term of fifteen
25 years to life in state prison. In 2002, the California Board of Prison Terms (“Board”) found
26 petitioner suitable for parole. On February 21, 2003, then Governor Gray Davis reversed the
27 Board’s decision. (MTD Ex. B.)

28 On April 14, 2003, petitioner filed in the Superior Court a state habeas petition

1 challenging the Governor's decision. (MTD Ex. C.) On September 17, 2003, the Superior
2 Court granted the petition. (MTD Ex. D.)

3 The state appealed, and, on July 22, 2004, the Court of Appeal reversed the Superior
4 Court's decision. (MTD Ex. E.)

5 Petitioner did not appeal the reversal to the California Supreme Court ("Supreme
6 Court"); rather, on April 13, 2007, he filed in the Court of Appeal a habeas petition
7 challenging the Governor's decision to reverse the grant of parole. (MTD Ex. F.) On April
8 19, 2007, the Court of Appeal denied the petition. (MTD Ex. G.)

9 On April 26, 2007, petitioner filed a petition for review in the California Supreme
10 Court. (MTD Ex. H.) On June 13, 2007, the California Supreme Court denied the petition.
11 (MTD Ex. I.)

12 On June 25, 2007, petitioner filed the instant federal habeas petition. Petitioner claims
13 the Governor's decision to reverse the grant of parole (1) was not based on sufficient
14 evidence, in violation of due process; (2) violates petitioner's rights under the Ex Post Facto
15 Clause of the Federal Constitution; and (3) was the result of a no-parole policy for murderers,
16 which policy denied petitioner his right to an impartial decision-maker, in violation of due
17 process.

18 DISCUSSION

19 A. Standard of Review

20 The Antiterrorism and Effective Death Penalty Act ("AEDPA") of 1996 became law
21 on April 24, 1996, and imposed for the first time a statute of limitations on petitions for a
22 writ of habeas corpus filed by state prisoners. Petitions filed by prisoners challenging non-
23 capital state convictions or sentences must be filed within one year of the latest of:

24 (A) the date on which the judgment became final by the conclusion of direct
25 review or the expiration of the time for seeking such review;

26 (B) the date on which the impediment to filing an application created by State
27 action in violation of the Constitution or laws of the United States is removed,
if the applicant was prevented from filing by such State action;

28 © the date on which the constitutional right asserted was initially recognized by
the Supreme Court, if the right has been newly recognized by the Supreme

1 Court and made retroactively applicable to cases on collateral review; or

2 (D) the date on which the factual predicate of the claim or claims presented
3 could have been discovered through the exercise of due diligence.

4 28 U.S.C. § 2244(d)(1).

5 Respondent moves to dismiss the instant petition on the ground that it was filed in
6 excess of the one-year limitations period. Specifically, respondent argues the petition is
7 untimely because petitioner unreasonably delayed in filing his state habeas petition in the
8 Court of Appeal. In opposition, petitioner argues the petition is timely because (1) there is no
9 time limit for challenging administrative decisions denying parole, and (2) he is entitled to
10 delayed commencement of the period of limitations.

11 The Court will address the parties' arguments as they apply to each of the relevant
12 time periods.

13 B. Application of the Statute of Limitations to Parole Decisions

14 At the outset, petitioner argues his petition cannot be dismissed as untimely because,
15 as a matter of law, the statute of limitations applies only to state court judgments and does
16 not apply to administrative decisions such as the denial of parole.

17 Petitioner's argument is without merit. The Ninth Circuit has made clear that the one-
18 year limitations period applies to all habeas petitions filed by persons in custody pursuant to
19 the judgment of a state court, even if the petition challenges a pertinent administrative
20 decision rather than a state court judgment. See Shelby v. Bartlett, 391 F.3d 1061, 1063 (9th
21 Cir. 2004). Such administrative decisions include decisions denying parole. See Redd v.
22 McGrath, 343 F.3d 1077, 1080 n.4 (9th Cir. 2003) (assuming without deciding that one-year
23 statute of limitations applies to decision denying parole.) Further, of the four possible
24 starting dates for the one-year limitations period set forth at 28 U.S.C. § 2244(d)(1), the date
25 set forth under sub-paragraph D is the date applicable to a petition challenging a decision
26 denying parole. See id. at 1082. Under that provision, a federal habeas petition filed by a
27 prisoner challenging such decision must be filed within one year of "the date on which the
28 factual predicate of the claim or claims presented could have been discovered through the

1 exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D).

2 As the one-year statute of limitations clearly applies to administrative decisions
3 denying parole, the Court must next determine the date on which the limitations period
4 commenced.

5 C. Commencement of the Limitations Period

6 Under 28 U.S.C. § 2244(d)(1)(D), the one-year limitations period begins to run one
7 day after the date the petitioner could have discovered the “factual predicate” of his federal
8 habeas corpus claim. See Redd, 343 F.3d at 1082.¹ “[T]he date of the ‘factual predicate’ . . .
9 . is determined independently of the exhaustion requirement by inquiring when [the
10 petitioner] could have learned of the factual basis for his claim through the exercise of due
11 diligence.” See id.

12 Respondent argues petitioner learned of the factual predicate of the claims raised
13 herein on February 21, 2003, the date the Governor wrote a letter to petitioner informing him
14 that the decision to grant parole had been reversed. (MTD Ex. B.) Petitioner asserts,
15 however, that he did not learn of the factual predicate of his claims until more than three
16 years later when, on August 31, 2006, the Ninth Circuit filed its opinion in Sass v. California
17 Bd. of Prison Terms, 461 F.3d 1123 (9th Cir. 2006), holding that prisoners incarcerated in
18 California have a protected liberty interest in parole.

19 Petitioner’s argument is not persuasive. The Ninth Circuit has held that where a
20 petitioner’s claim challenges an administrative decision, such petitioner learns of the factual
21 basis of that claim at the time the decision becomes final. See Shelby, 391 F.3d at 1066
22 (holding limitations period began to run day after prisoner received timely notice of denial of
23 administrative appeal challenging disciplinary decision); Redd, 343 F.3d at 1079 (holding
24 limitations period began to run when Board of Prison Terms denied prisoner’s administrative
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26 ¹The one-year period is calculated in accordance with Rule 6(a) of the Federal Rules
27 of Civil Procedure, the general rule for computing time in federal courts. See Patterson v.
28 Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Under Rule 6(a), “the day of the act, event, or
default from which the designated period of time begins to run shall not be included” in
calculating the designated period of time. Fed. R. Civ. P. 6(a).

1 appeal challenging decision denying parole). Here, the administrative decision at issue – the
2 Governor’s February 21, 2003 decision reversing the grant of parole – became final when
3 issued because there are no provisions for further administrative review. See Cal. Const., art.
4 V, § 8(b) (describing governor’s parole authority and applicable procedures). As the record
5 shows that a letter informing petitioner of the Governor’s decision was sent to petitioner on
6 the same date the decision became final, (MTD Ex. B), and petitioner does not contend he
7 did not receive timely notice of said decision, the Court finds petitioner learned of the factual
8 predicate of his claims on February 21, 2003.

9 Petitioner asserts that even though he knew of the Governor’s decision as of
10 February 21, 2003, he did not learn of the legal significance of such until August 31, 2006,
11 when Sass was filed, because “[n]o federal protected liberty interest in parole existed” prior
12 to Sass. To the extent petitioner argues that he could not have discovered the legal predicate
13 of his claims until such decision, petitioner’s argument likewise fails, as petitioner is
14 mistaken in his reading of the Sass decision.

15 In Sass, the Ninth Circuit considered the question, *inter alia*, whether the California
16 Supreme Court’s decision in In re Dannenberg, 34 Cal. 4th 1061 (2005), superceded the
17 Ninth Circuit’s earlier decisions holding that, under clearly established United States
18 Supreme Court case law, California’s parole statutes give rise to a protected liberty interest in
19 parole. See Sass, 461 F.3d at 1127 (discussing McQuillion v. Duncan, 306 F.3d 895 (9th Cir.
20 2002), and Biggs v. Terhune, 334 F.3d 910 (2003)). Examining Dannenberg, the Ninth
21 Circuit found that the California Supreme Court’s decision was limited to addressing the
22 narrow question of how the parole statutes should be applied, not whether such statutes
23 created a protected liberty interest, see Sass, 461 F.3d at 1127-28, and concluded that
24 “Dannenberg does not explicitly or implicitly hold that there is no constitutionally protected
25 liberty in parole,” *id.* at 1128. Consequently, the Ninth Circuit held, the petitioner in Sass
26 had a constitutionally protected interest in a parole date. Id.

27 Contrary to petitioner’s interpretation, Sass did not hold as a matter of first impression
28 that California’s parole statutes give rise to a protected liberty interest in parole; rather, Sass

1 reaffirmed the Ninth Circuit's earlier holdings in McQuillion and Biggs to that effect. As
 2 McQuillion was filed September 25, 2002, approximately five months before the date on
 3 which the Governor reversed the grant of parole in petitioner's case, and Biggs was filed
 4 June 30, 2003, approximately four months after the Governor's decision, petitioner's
 5 assertion that he could not have discovered the legal predicate of his claims until 2006, when
 6 Sass was filed, is unsupported.²

7 Based on the foregoing, the Court finds the factual predicate of petitioner's claims was
 8 the Governor's February 21, 2003 decision to reverse the grant of parole; the one-year
 9 limitations period thus began to run the next day, February 22, 2003, see Redd, 343 F.3d at
 10 1082, and the presumptive filing date for petitioner's federal habeas petition was one year
 11 later, February 22, 2004. As the instant petition was not filed until June 25, 2007, the
 12 petition, absent statutory or equitable tolling, is untimely.

13 D. Statutory Tolling

14 The one-year statute of limitations is tolled under § 2244(d)(2) for the "time during
 15 which a properly filed application for State post-conviction or other collateral review with
 16 respect to the pertinent judgment or claim is pending." 28 U.S.C. § 2244(d)(2); see Redd,
 17 343 F.3d at 1084 (holding prisoner challenging administrative decision receives statutory
 18 tolling for period during which state habeas petition pending). The statute of limitations is
 19 not tolled, however, during the time between the date on which the relevant final decision
 20 under 28 U.S.C. § 2244(d)(1) is issued and the date on which the first state collateral
 21 challenge is filed. Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999). Thus, in the instant
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23 ²Alternatively, petitioner argues he could not have discovered the legal predicate of
 24 his claims until the Ninth Circuit filed its decision in Hayward v. Marshall, 512 F.3d 536 (9th
 25 Cir. 2008), on January 3, 2008. Such argument likewise is without merit. In Hayward, the
 26 Ninth Circuit held that the Governor's reversal of a decision to grant parole violated due
 27 process, as the decision was not supported by "some evidence." See id. at 544-548.
 28 Hayward, however, did not create a new rule of law with respect to petitioner's due process
 rights; rather, Hayward expressly relied on Sass for the proposition that prisoners in
 California have a protected liberty interest in parole. See id. at 542. In any event, Hayward
 can no longer be relied upon as precedent, as the Ninth Circuit recently granted rehearing en
 banc. See Hayward v. Marshall, 2008 WL 2131400 (9th Cir. May 16, 2008) (granting
 rehearing en banc).

1 case, the statute began to run on February 22, 2003, the day after the Governor's decision
2 became final, and continued to run for 52 days, until petitioner filed a state habeas petition in
3 the Superior Court on April 14, 2003.

4 Ordinarily, the one-year limitations period is tolled under § 2244(d)(2) from the time a
5 California prisoner files his first state habeas petition until the California Supreme Court
6 rejects his final collateral challenge. Carey v. Saffold, 536 U.S. 214, 219-20 (2006).
7 Consequently, in the instant case, the limitations period would be tolled continuously from
8 April 14, 2003, when petitioner filed his first state habeas petition in the Superior Court, until
9 June 13, 2007, when the Supreme Court denied his final state habeas petition. Respondent
10 argues that petitioner is not entitled to such continuous tolling of the limitations period,
11 however, because petitioner unreasonably delayed in filing his state habeas petition in the
12 Court of Appeal. Although petitioner has not expressly addressed respondent's argument,
13 the Court will assume that petitioner's argument for delayed commencement of the statute of
14 limitations based on the Sass decision applies equally to the matter of his delayed filing in
15 state court.

16 The Court now reviews petitioner's state habeas petitions in order to determine
17 whether statutory tolling is available for each of the time periods during which those petitions
18 were pending in state court.

19 1. Superior Court Petition and the State's Appeal

20 As noted above, on April 14, 2003, petitioner filed a state habeas petition in the
21 Superior Court; on September 17, 2003, the Superior Court granted the petition; the State of
22 California appealed the grant of relief; and on July 22, 2004, the Court of Appeal reversed
23 the Superior Court's decision. There is no dispute that the limitations period was tolled
24 continuously from the date petitioner filed his Superior Court petition until the date of the
25 Court of Appeal's decision thereon.

26 2. Court of Appeal and Supreme Court Petitions

27 Again, as noted, petitioner did not appeal the Court of Appeal's decision to the
28 Supreme Court, and instead, on April 13, 2007, 995 days after the Court of Appeal filed its

1 decision, petitioner filed a habeas petition in the Court of Appeal, after which, on April 19,
2 2007, the Court of Appeal denied the petition; thereafter, on April 26, 2007, petitioner filed a
3 petition for review in the Supreme Court, which petition was denied on June 13, 2007.

4 As discussed above, petitioner ordinarily would be entitled to continuous tolling from
5 the time his first state habeas petition was filed in the Superior Court until his final state
6 habeas petition was denied by the Supreme Court. Accordingly, the Court next addresses
7 respondent's argument that petitioner is not entitled to statutory tolling for the 995 days that
8 elapsed between the Court of Appeal's July 22, 2004 reversal of the Superior Court's
9 decision and the filing of petitioner's petition in the Court of Appeal, based on unreasonable
10 delay in the filing of the latter petition.

11 In Evans v. Chavis, 546 U.S. 189 (2006), the United States Supreme Court clarified
12 that "only a *timely* appeal" tolls the one-year statute of limitations, and "in California,
13 'unreasonable' delays are not timely." Id. at 197.³ Where there is no clear indication from
14 the state court as to whether a petition was timely under California law, the federal court
15 must itself examine the delay and determine whether the petition was filed within what
16 California would consider a reasonable period of time. Id. at 197-98. Even when a
17 California state habeas petition is denied on the merits, the federal court must determine
18 whether the petition was timely, if the issue of timeliness was not expressly addressed by the
19 state court. Id.

20 Here, the Court of Appeal denied petitioner's habeas petition summarily, without
21 expressly addressing the issue of timeliness. Under such circumstances, this Court must
22 apply Chavis and determine whether the petition was filed within what California would
23 consider a reasonable period of time. See id. at 197 ("If the appearance of the words 'on the
24 merits' [in a California state court decision denying habeas relief] does not automatically
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26 ³In so doing, Evans reiterated the holding of Carey v. Saffold, 536 U.S. 214 (2002),
27 that the requirement that an appeal be filed without unreasonable delay applies, by analogy,
28 to the filing of petitions for appellate review under California's collateral review process,
wherein a state prisoner may seek review of an adverse lower court decision by filing an
original petition rather than a notice of appeal. Id. at 192-93.

1 warrant a holding that the filing was timely, the absence of those words could not
2 automatically warrant a holding that the filing was timely.”)

3 In Chavis, there was an unexplained six-month delay between the denial of the
4 petitioner’s state habeas petition in the California Court of Appeal and the filing of his
5 subsequent petition in the California Supreme Court. Chavis found the delay unreasonable,
6 holding as follows:

7 Six months is far longer than the short periods of time, 30 to 60 days, that most
8 States provide for filing an appeal to the state supreme court. It is far longer
9 than the 10-day period California gives a losing party to file a notice of appeal
10 in the California Supreme Court. We have found no authority suggesting, nor
11 found any convincing reasons to believe, that California would consider an
12 unjustified or unexplained 6-month delay reasonable. Nor do we see how an
13 unexplained delay of this magnitude could fall within the scope of the federal
14 statutory word “pending” as interpreted in [Carey v. Saffold].

15 Id. at 201 (internal quotations and citations omitted).

16 Chavis thus made clear that, in California, an unjustified delay of six months, or 180
17 days, is presumptively unreasonable. Applying Chavis to the instant matter, the Court finds
18 the California courts would consider the 995-day delay at issue herein unreasonable, absent
19 justification.

20 In California, a habeas petitioner must justify any significant or substantial delay in
21 seeking habeas corpus relief. King v. Lamarque, 464 F.3d 963, 966 (9th Cir. 2006) (citing In
22 re Clark, 5 Cal. 4th 750, 750-51 (1993)); see also In re Robbins, 18 Cal. 4th 770, 805 (1998)
23 (“A claim or subclaim that is substantially delayed will nevertheless be considered on the
24 merits if the petitioner can demonstrate ‘good cause’ for the delay.”) The California courts
25 have not set forth standards for determining what factors justify any particular length of
26 delay, however. See King, 464 F.3d at 966. Here, the only justification offered by petitioner
27 for his delayed filing in the Court of Appeal is his assertion, discussed above, that he could
28 not have filed his petition in the Court of Appeal prior to the Ninth Circuit’s decision in Sass
v. California Bd. of Prison Terms, 461 F.3d 1123 (9th Cir. 2006). As noted, however, such
assertion is unsupported, in that the Ninth Circuit had clearly held as of the date of its
decision in McQuillion v. Duncan, 306 F.3d 895 (9th Cir. 2002), that California prisoners

1 had a protected liberty interest in parole.⁴

2 Based on the foregoing, the Court finds the Court of Appeal would not have found
3 petitioner's delayed filing was justified; accordingly, as the 995-day delay was both
4 unreasonable and unjustified, petitioner is not entitled to statutory tolling for that period.

5 Petitioner is entitled, however, to statutory tolling for the 61 days that elapsed between
6 the filing of the petition in the Court of Appeal and the denial of the petition for review by
7 the Supreme Court.

8 3. Federal Habeas Petition

9 On June 14, 2007, the day after the Supreme Court's denial, the statute of limitations
10 began to run, and it continued to do so until petitioner filed the instant petition 12 days later,
11 on June 25, 2007.

12 In sum, by the time petitioner filed his federal habeas petition, the following periods
13 of time had run against the statute of limitations: (1) 52 days before the filing of petitioner's
14 Superior Court petition; (2) 995 days between the Court of Appeal's July 22, 2004 decision
15 and the filing of the petition in the Court of Appeal on April 13, 2007; and (3) 12 days after
16 the denial of the Supreme Court petition and the filing of the instant petition. Thus, 1059
17 days elapsed from the date on which the Governor's decision to reverse the grant of parole
18 became final and the date on which petitioner filed the instant federal habeas petition. As
19 this number of days exceeds the one-year limitations period by almost two years, the petition
20 is untimely, unless petitioner can show he is entitled to equitable tolling.

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23 ⁴The Court notes that in the petition filed by petitioner in the Court of Appeal,
24 petitioner also argued that the Governor's decision should be reversed in view of certain
25 Courts of Appeal decisions filed in 2005 and 2006, in which the Governor was found to have
26 improperly reversed a grant of parole. (MTD Ex. F at 2.) Said rulings, however, did not
27 alter the legal standard set forth by the California Supreme Court in In re Rosenkrantz, 29
28 Cal. 4th 616, 660-63 (2002), for reviewing such decisions. See In re Elkins, 144 Cal. App.
4th 475, 488-89 (2006) (holding Rosenkrantz applies to review of Governor's decision to
reverse parole); In re Lee, 143 Cal. App. 4th 1400, 1407-08 (2005) (same); In re Scott, 133
Cal. App. 4th 573, 578, 590 (2005) (same). As Rosenkrantz was decided before the
Governor's decision at issue herein, the Court concludes the Court of Appeal would not have
found petitioner's delayed filing was justified by the above-cited subsequent decisions.

1 E. Equitable Tolling

2 The United States Supreme Court has “never squarely addressed the question whether
3 equitable tolling is applicable to [the one-year] statute of limitations.” Pace v. DiGuglielmo,
4 544 U.S. 408, 418 n.8 (2005). The Ninth Circuit has held, however, that the one-year
5 limitations period may be equitably tolled. See Calderon v. United States District Court
6 (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled in part on other grounds by
7 Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc).

8 Equitable tolling is applicable only “if extraordinary circumstances beyond a
9 prisoner’s control make it impossible to file a petition on time.” Roy v. Lampert, 455 F.3d
10 945, 950 (9th Cir. 2006). Specifically, the prisoner must show that the extraordinary
11 circumstances were the cause of his untimeliness. Spitsyn v. Moore, 345 F.3d 796, 799 (9th
12 Cir. 2003). Equitable tolling is justified in few cases, as the threshold necessary to trigger
13 such tolling is very high. Id. The petitioner bears the burden of showing that he is entitled to
14 equitable tolling, and the determination whether such tolling applies is a fact-specific inquiry.
15 Id.

16 Here, petitioner has not argued that he is entitled to equitable tolling, and no grounds
17 for such tolling are apparent from the record that has been developed in this matter.
18 Accordingly, the Court finds petitioner is not entitled to equitable tolling of the one-year
19 limitations period.

20 **CONCLUSION**


21 For the foregoing reasons, respondent’s motion to dismiss the petition as untimely is
22 hereby GRANTED and the petition for a writ of habeas corpus is hereby DISMISSED.

23 This order terminates Docket No. 9.

24 The Clerk shall close the file.

25 IT IS SO ORDERED.

26 DATED: June 9, 2008

27 
MAXINE M. CHESNEY
28 United States District Judge